## AMENDMENT XIV

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On February 20, 1996, Petitioner was charged by way of Indictment with Count One, murder in the death of Medhat Zamzam; Count Two, murder in the death of Souad Bousserhan; Count Three, armed robbery of Medhat Zamzam; Count Four, armed robbery of Souad Bousserhan;[1] and Count Five, burglary of a dwelling with an assault or battery or with a firearm.

Petitioner filed a Motion to Suppress Statements and Admissions. The motion alleged, *inter alia*, that after Petitioner's arrest but before Miranda, Petitioner was interviewed by the media and by Souad Amed, an employee of the business where Petitioner was arrested, acting under the auspices of law enforcement agents. The trial court denied Petitioner's motion to suppress. Additionally, Petitioner filed a Motion to Suppress Statements Taken in Violation of Article 36 of the Vienna Convention on Consular Relations. The motion alleged that at no time after his arrest was Petitioner advised of his right to speak to consular officials as guaranteed by Article 36 of the Vienna Convention on Consular Relations.[2] The motion sought suppression of all statements obtained by police taken in violation of his consular notification rights as guaranteed by Article 36 of the Vienna Convention on Consular Relations.

Petitioner filed an Omnibus Motion to Suppress Evidence. The motion sought to suppress evidence seized from Petitioner's vehicle before his arrest; evidence seized from Petitioner's apartment, before his arrest; and evidence seized from Petitioner's hotel room in Puerto Rico, after his

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[1]The State eventually declined to prosecute Counts Three and Four.

[2]Petitioner is a Moroccan national.

arrest.[3] The trial court entered an order denying Petitioner's Omnibus Motion to Suppress Evidence and Renewed Motion to Suppress Statements and Admissions.

A jury of twelve and two alternates were chosen. Trial began on June 18, 2003. After a protracted trial, Petitioner was found guilty of Count One, first degree murder of Medhat Zamzam, Count Two, first degree murder of Souad Bosserhan, and Count Five, burglary of a dwelling with a firearm. A judgment of conviction was entered by the trial court on June 20, 2003.

On September 19, 2003, the trial court sentenced Petitioner to natural life as to Count One, natural life as to Count Two, concurrent with the sentence in Count One, and to natural life as to Count Five, concurrent with the sentence in Count One. Petitioner filed a timely notice of appeal.

On appeal, Petitioner argued, *inter alia*: (1) that the trial court erred in denying his motions to suppress statements, and (2) that the trial court erred in denying his motion to suppress evidence.

On March 4, 2005, the District Court of Appeal, Fifth District, affirmed Petitioner's judgment of conviction and sentence. *Rahmani v. State*, 898 So.2d 132 (Fla. 5th DCA 2005). A copy of the order appears at Appendix "A".

On March 18, 2005, Petitioner filed a Motion for Rehearing, Clarification or Certification. On Motion for Rehearing, Petitioner alleged, *inter alia*, that the Court of Appeal overlooked or misapprehended the law and/or the facts in this case in that the Court of Appeal cited *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971); and *State v. Smith*, 641 So.2d 849 (Fla. 1994) to support its position. Petitioner

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[3]The State stipulated that it did not intend to use at trial evidence obtained from Petitioner's apartment or hotel room in Puerto Rico.

argued that the Court of Appeal overlooked the deliberate use of deception and manipulation by the police as a means of evading Petitioner's constitutional right to remain silent and right to counsel, citing *Miller v. Fenton*, 474 U.S. 104, 116 (1985); *Walls v. State*, 580 So.2d 131, 133-34 (Fla. 1991); and *Maine v. Moulton*, 474 U.S. 159, 179 (1985). On April 7, 2005, the Court of Appeal entered an order denying Petitioner's Motion for Rehearing, Clarification or Certification, without written opinion. A copy of the order appears at Appendix "B".

## REASONS FOR GRANTING THE WRIT

Petitioner submits that he was denied a fair trial and that the Florida District Court of Appeal has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Additionally, since in this case Petitioner has continuously relied upon his rights conferred under an international treaty which the U.S. Supreme Court has heretofore not directly addressed and which different state and federal courts (and even different panels in the same court) have differed in their interpretation and application of the terms of this treaty, it is imperative for this Court to exercise its unique authority to clarify for all courts the proper application of the terms of this international treaty and ensue the rights of all foreign nationals who are more susceptible to being unfamiliar with the culture, language, laws and judicial proceedings in this country.

## ARGUMENT AND CITATION OF AUTHORITY

### ISSUE I

Petitioner contends that the trial court erred in denying his motions to suppress statements and that the Florida District Court of Appeal has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Petitioner submits that any inculpatory statements or admissions that he may have made prior to, during or after his detention should have been suppressed. The evidence is inadmissible because it was obtained in violation of Petitioner's Fifth Amendment right against self-incrimination, Sixth Amendment right to counsel, and due process of law.

## A. VIOLATIONS UNDER THE UNITED STATES CONSTITUTION

Petitioner filed a Motion to Suppress Statements and Admissions. The motion alleged, *inter alia*, that after Petitioner's arrest but before Miranda, Petitioner was interviewed by the media, and by Souad Amed, an employee of the business where Petitioner was arrested, acting under the auspices of law enforcement agents.

Petitioner was placed under arrest, handcuffed and placed in the back seat of a police vehicle. A reporter for Channel 9 News approached the vehicle. Law enforcement officers observed a conversation between the reporter and Petitioner, determined that they wanted a tape recording of that conversation and placed a tape recorder in the vehicle. Law enforcement knew that the reporter was going to interview Petitioner and wanted a copy of the videotape to use against Petitioner at trial. Law enforcement moved their cars and an officer rolled down the window so the reporter could get his body through the window. After the interview with the reporter, Petitioner requested to speak with a Value-Rent-a-Car employee (Souad), who agreed to speak with him. Law enforcement asked the Value-Rent-a-Car employee if she would record the conversation and she agreed. Although Petitioner had been in custody for approximately two hours before the reporter walked up to the vehicle, he was not advised of his right to remain silent or his right to counsel until after he was transported to the county jail, well after the interview.

In making any statements, Petitioner must have voluntarily waived both his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. In order to use statements made by a defendant, the state must show that the defendant knowingly and voluntarily waived his Fifth Amendment right against self-

incrimination. *Miranda v. Arizona*, 384 U.S. 436, 467-69 (1966). Here, Defendant was not advised of his Fifth and Sixth Amendment rights and clearly did not knowingly and intelligently waive them. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

The facts of this case involve a full scale arrest. When officers handcuffed Petitioner and placed him in the backseat of the police car, he was not free to leave. Petitioner was clearly in custody for purposes of Miranda yet the officers failed to advise him of his right to counsel and against self-incrimination.

The test for determining whether private individuals are agents of the government is whether, in consideration of the circumstances, the individuals acted as instruments of the state. See *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). To determine whether a private individual acts as an instrument of the state, courts look to (1) whether the government was aware of and acquiesced in the conduct; and (2) whether the individual intended to assist the police or further his own ends. See *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994).

The deliberate use of deception and manipulation by the police appears to be incompatible "with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means," *Miller v. Fenton*, 474 U.S. 104, 116 (1985), and raises serious concerns that Petitioner's will was overborne. Here, the conduct in question qualifies as a gross deception. Petitioner was handcuffed in the back seat of a marked patrol unit when a reporter approached the vehicle. The police observed a conversation between the reporter and Petitioner. The police determined that they wanted a tape recording of that conversation and supplied a tape recorder, which was placed in the patrol vehicle. The police even moved their vehicles and rolled down the

window so the reporter could get his body through the window. The police would not have allowed a stranger to walk up to the police vehicle where the suspect in a murder case was being held in custody. The police knew that the reporter was going to interview the suspect and had in mind that they were going to get a copy of the videotape. The police were not opposed to the reporter's actions and wanted the reporter to go ahead with the interview. Additionally, after the reporter's interview, the police asked Ahmed if she would record her conversation with Petitioner and she agreed.

In *Maine v. Moulton*, 474 U.S. 159 (1985), the Court applied the analysis developed in *United States v. Henry*, 447 U.S. 264 (1980), to a situation outside of the jailhouse setting. The Court held that Moulton's right to counsel was violated when the State made a deal with his codefendant in which the codefendant would surreptitiously record Moulton's statements in return for a favorable plea bargain. The State wired the codefendant when he attended an all-day meeting with Moulton, at Moulton's request, to plan their common defense. The Court rejected the argument that Moulton's initiation of the meeting exonerated the State from any wrongdoing. The Court held that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." 474 U.S., at 176.

Petitioner's statements should not have been used against him because they were elicited by the State in the absence of his counsel and without his being informed of his Miranda rights. In light of the pronouncement of the Supreme Court of the United States in *Henry*, Petitioner's incriminating statements made to the reporter while in custody should have been suppressed because these statements were made in the absence of counsel, with no

prior waiver of counsel, and were elicited by the State's stratagem deliberately designed to elicit incriminating statements from Petitioner. Therefore, the introduction of these statements violated Petitioner's Sixth Amendment right to the assistance of counsel. See *Massiah v. United States*, 377 U.S. 201 (1964) (to have any effect, the sixth amendment must apply to indirect surreptitious interrogations).

Moreover, the Value-Rent-a-Car employee's interview was an extension of previous unlawful interrogation. Under the circumstance, the interview constituted an unlawful interrogation violating Petitioner's Fifth Amendment rights. See *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *Edwards v. Arizona*, 451 U.S. 477 (1981).

## B. VIOLATIONS UNDER THE VIENNA CONVENTION

Petitioner contends that law enforcement failed to advise the Moroccan Consulate of his arrest and incarceration and further failed to inform him of his right to have contact with the Moroccan Consulate under the Vienna Convention on Consular Relations. Specifically, Petitioner submits that the Vienna Convention was violated when the arresting authorities failed to inform him that, as a foreign national, he had the right to contact the Moroccan Consulate. The Vienna Convention confers on a Moroccan national the right to consular assistance following his arrest, specifically to arrange for his legal representation. As a treaty approved by the United States Senate and formally ratified by the President, the convention is the supreme law of the land under our Constitution. Moreover, the Convention itself provides that the rights expressed in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso,

however, that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under this Article are intended." Vienna Convention, Art. 36(2).

Petitioner submits that after his arrest, prior to being interviewed, he was not advised of his right to speak to consular officials concerning his arrest as guaranteed by Article 36 of the Vienna Convention.

The International Court of Justice delivered its Judgment in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31). In its Judgment, the Court found that by not timely informing 51 Mexican nationals of their rights under Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations, the United States of America breached the obligations incumbent upon it under that subparagraph. Additionally, the Court found that by not notifying the appropriate Mexican consular post without delay of the detention of 49 Mexican nationals and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1(b). The Court also found that, in relation to 34 Mexican nationals, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1(c), of the Convention.

Petitioner submits that this Court should address at least two specific issues raised by the Avene Judgment: (1) whether the International Court of Justice's judgment is binding on American courts; and (2) whether Article 36(1)(b) of the Convention creates a judicially enforceable

individual right. See *Medellin v. Dretke*, 125 S.Ct. 2088 (2005) (Justice O'CONNOR, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting).

Article 36 of the Vienna Convention on Consular Relations guarantees open channels of communication between detained foreign nationals and their consulates in signatory countries:

> "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."

Vienna Convention on Consular Relations, Art. 36(1)(b), Apr. 24, 1963, [1970] 21 U.S.T. 77, 101, T.I.A.S. No. 6820.

In Avena, the ICJ determined that the United States had breached its obligation to inform 51 Mexican nationals, all sentenced to death in this country, of their right to consular notification. Here, as in *Medellin*, this case presents questions that will inevitably recur. *Medellin*, at 2096. Here as in *Medellin*, this case presents questions that have the potential to affect every foreign nation/international visitor to this country, as any one of them could be taken into

custody for questioning, detained or imprisoned. This situation will continue to recur indefinitely and begs for this Court's attention.

Petitioner submits that the treaty confers individual rights. See judgment in LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 490-491, 497-498 (Judgment of June 27). See also Avena, supra, repeating the construction it had given to Article 36 in LaGrand, the ICJ decided that Medellin and 50 others were entitled to review and reconsideration of their convictions and sentences because the United States, through various individual States, had violated their Vienna Convention rights. Avena, supra, ¶ 153.

Article 36 of the Vienna Convention on Consular Relations is a self-executing treaty. A self-executing treaty is domestic law. It "operates of itself," as "a rule for the Court," "equivalent to an act of the legislature." *Foster v. Neilson*, 2 Pet. 253, 314, 7 L.Ed. 415 (1829). Because the Convention is self-executing, then, its guarantees are susceptible to judicial enforcement just as the provisions of a statute would be. See *Edye v. Robertson*, 112 U.S. 580, 598-599 (1884) ("A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute"); see generally L. Henkin, Foreign Affairs and the United States Constitution 206-209 (2d ed.1996).

Article 36(1)(b) entails three different obligations for signatory host countries. Their competent authorities shall (1) inform the consul of its nationals' detentions, (2) forward communication from a detained national to his consulate, and (3) "inform the person concerned without delay of his rights under this sub-paragraph." 21 U.S.T., at 101. Of

these, the third exclusively concerns the detained individual, and it is the only obligation expressed in the language of rights.

The President of the United States has informed his Attorney General that the United States would discharge its obligations under the Avena judgment "by having State courts give effect to the decision." George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). It is "this Court's responsibility" to address and resolve any significant legal ICJ-related issues that may arise in the state-court proceedings. *Medellin*, at 2107-08 (GINSBURG, J., concurring).

## ISSUE II

Petitioner contends that the trial court erred in denying his motion to suppress evidence and that the Florida District Court of Appeal has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Petitioner submits that the evidence is inadmissible because it was obtained in violation of Defendant's Fourth Amendment right against illegal search and seizure.

Petitioner filed an Omnibus Motion to Suppress Evidence. The motion sought to suppress, *inter alia*, evidence seized from Petitioner's vehicle before his arrest. The motion alleged that pursuant to a search warrant, police searched Petitioner's vehicle while it was parked outside 5991 Curry Ford Road, Apartment 220, Orlando, Florida, and seized live shotgun shells and plastic gloves. The motion argued that the search warrant for the vehicle was improperly issued because the affidavit in support of the warrant failed to establish the necessary probable cause that evidence relevant to the offense in question would be discovered in Petitioner's vehicle. The affidavit indicates

that Investigator Jaynes located a witness who observed someone exit a light yellow, four door vehicle with front end damage and a cracked windshield parked on her front lawn, walk directly to the crime scene at approximately 10:00 a.m., only to return to his vehicle and depart the area approximately 10 minutes later. The witness subsequently identified Petitioner as the individual who she saw exit the vehicle and walk to the crime scene. The affidavit did not state the date on which the witness allegedly saw the vehicle or Petitioner. The motion argued that there was not a substantial basis for concluding that there was a fair probability that evidence of the crimes in question would be found in Petitioner's vehicle. Accordingly, the warrant was improperly issued. After reviewing the motion and the search warrant, the trial court found that the affidavit for the search warrant of the defendant's automobile contained sufficient facts that would lead a reasonable person to believe there to be probable cause for the search of the vehicle described in the affidavit, and entered an order denying Petitioner's Omnibus Motion to Suppress Evidence. Although Petitioner raised this issue on direct appeal, the Florida District Court of Appeal failed to address this issue in its affirmance of Petitioner's judgment of conviction.

Probable cause for issuance of a search warrant is determined solely with reference to the facts stated in the warrant and the supporting affidavit. The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983).

The probable cause statement in the present case is totally devoid of any facts establishing any probability that evidence of crime would be found at the places to be searched. Although a witness observed Petitioner outside the victims' residence on one occasion, there is no indication when she observed Petitioner or that he had committed any crime or evidence of crime at that time. Thus, there was not a substantial basis for a conclusion that probable cause existed to believe that evidence of crime would be found at the place to be searched. Moreover, the good faith exception to the warrant requirement under *United States v. Leon*, 468 U.S. 897 (1984), does not apply. That exception does not apply where an affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Id. at 923, 104 S. Ct. 3405, citing *Brown v. Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part). In light of the fact that the search warrant application in this case provided no basis whatsoever for concluding that evidence of crime would be found in Petitioner's vehicle, it cannot be said that the officers executing the warrant acted in good faith in doing so. Accordingly, the judgment of conviction and sentence must be reversed and this case remand for a new trial.

## CONCLUSION

Petitioner's judgment of conviction and sentence were obtained in violation of the U.S. Constitution and the Vienna Convention. The trial court erred in failing to acknowledge and apply well established law and in its interpretation of the international treaty. The District Court of Appeal, Fifth District, erred in affirming the trial court's orders.

Petitioner submits that the trial court and the District Court of Appeal have so far departed from the application of the law to the undisputed facts in this case that require this Court to exercise its supervisory power; and that the state court has erroneously interpreted and applied the terms of the Vienna Convention as to require this Court to exercise its unique authority to clarify and apply international and federal law.

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/

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